

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

ELIJAH DWAYNE JOUBERT,	§	
	§	
Petitioner,	§	
	§	
v.	§	CAUSE NO. 4:13-cv-3002
	§	
	§	
BOBBY LUMPKIN, Director, Texas	§	
Department of Criminal Justice, Cor-	§	
rectional Institutions Division,	§	CAPITAL HABEAS CASE
	§	
Respondent.	§	

**PETITIONER'S MOTION FOR LEAVE TO FILE UNDER SEAL**

**TO THE HONORABLE DAVID HITTNER, UNITED STATES DISTRICT JUDGE:**

Petitioner Elijah Joubert, by and through counsel, moves this Court for leave to file to under seal, and have considered *ex parte*, a motion to temporarily alter the terms of counsel's appointment under 18 U.S.C. § 3599(e).<sup>1</sup> Sealing and ex parte consideration are justified on grounds that Petitioner's motion (1) relates to matters usually considered ex parte and under seal pursuant to Guidelines for the Administration of the Criminal Justice Act, 18 U.S.C. § 3006A; (2) reveals privileged communications

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<sup>1</sup> Petitioner's motion is being filed contemporaneously to the present motion.

and counsel's mental impressions, and (3) reveals [REDACTED]

[REDACTED]

[REDACTED]. Pursuant to Fed. R. Civ. P. 5.2(d) and (f), Petitioner moves the Court to enter the attached proposed order granting leave to file the motion *ex parte* and directing the Clerk to maintain the motion under seal. Mr. Joubert states the following as good cause for granting this motion:

Petitioner's Motion [REDACTED] relates to appointed counsel's representation. Both this Court's CJA Plan, General Order 2018-18, § XIII.A, and Judicial Conference policy authorize sealed, *ex parte* consideration of case budgets under the CJA. *See* U.S. Judicial Conference, CJA Guidelines, § 510.30(b)-(d) (addressing limitations on disclosure of information pertaining to activities under the CJA). District Courts in Texas routinely adhere to those guidelines. *See, e.g., Ruiz v. Thaler*, No. SA-03-CA-303-OG, 2009 WL 10690049, at \*1 (W.D. Tex. Dec. 8, 2009) (finding CJA matter properly handled *ex parte* and under seal); accord. *Rodriguez v. Stephens*, No. 5:13-cv-233, 2013 WL 12429969, at \*4 (N.D. Tex. Oct. 28, 2013); *United States v. Conley*, No. 4:06-cr-088, 2007 WL 9724437, at \*2 (N.D. Tex., Mar. 26, 2007) (same). Although Petitioner is represented by the Federal Public Defender for the Western District of Texas's Capital Habeas Unit ("CHU"), and therefore does not require court-approval for compensable time, Petitioner's motion raises an issue analogous to the budgeting of counsel's time. *See e.g., Smith v. Mays*, No. 3:99-cv-0731,

Doc. 307 (M.D. Tenn. Apr. 16, 2019) (granting leave to file motion regarding representation by CHU ex parte and under seal); *Dellinger v. Colson*, No. 3:09-cv-00104, Doc. 81 (E.D. Tenn. Apr. 3, 2012) (same). Accordingly, Petitioner submits his motion should be maintained under seal and considered ex parte like case-budgeting materials.

Although there is a common-law presumption of access to judicial records, “the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.” *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978); *see also Bradley on behalf of AJW v. Ackal*, 954 F.3d 216, 225 (5th Cir. 2020). Petitioner’s motion reveals the contents of attorney-client communications and the mental impressions of his counsel. Those privileges are sufficient to overcome the common-law presumption of access to judicial records. *E.g., Lambright v. Ryan*, 698 F.3d 808 (9th Cir. 2012) (following *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003) (*en banc*), and ordering hearing transcript sealed to protect privileged matter revealed by petitioner’s prior counsel).

Petitioner’s motion reveals potentially harmful and embarrassing information about [REDACTED]. The State could use that information to obtain an unfair advantage [REDACTED]. The Supreme Court has written approvingly of courts “refus[ing] to permit

their files to serve ... as sources of business information that might harm a litigant's competitive standing." *Nixon*, 435 U.S. at 598. It follows that this Court's records should not serve as a source of information that could be used to harm [REDACTED] [REDACTED].

Undersigned counsel hereby certifies that on December 15, 2020, he conferred with opposing counsel, Matthew Ottoway, in an effort to resolve this matter. The undersigned is authorized to inform the Court that the State opposes this Motion and the sealed motion, although he is unaware of what the motion seeks.

For the foregoing reasons, Mr. Joubert respectfully requests this Court enter the attached proposed order.

DATED: Dec. 15, 2020

Respectfully submitted,

MAUREEN FRANCO  
FEDERAL PUBLIC DEFENDER

/s/ Tivon Schardl  
TIVON SCHARDL  
Capital Habeas Unit Chief  
Florida Bar No. 73016  
TXSD Bar No. 3145499  
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/s/ Timothy Gumkowski  
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Attorneys for Petitioner Elijah Joubert

### CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December 2020, I served the foregoing Motion for Leave to File Under Seal and Proceed *Ex Parte* on all counsel of record by filing it with the CM/ECF system.

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**PROPOSED ORDER**

Before the Court is Petitioner's Motion for Leave to File Petitioner's Motion for Limited Appearance *Ex Parte* and Under Seal. Having considered and weighed in the balance the competing interests of the public in having access to judicial records, and Petitioner's interest in maintaining attorney-client and work-product privileges, the privacy interests of those involved, and the Court's interest in not having its files used for an improper purpose, the Court finds the Motion is supported by GOOD CAUSE. It is hereby ORDERED as follows:

1. Petitioner's Motion is GRANTED.
2. The Clerk shall maintain under seal Petitioner's motion filed under seal on December 15, 2020.

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Hon. David Hittner  
United States District Judge